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In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Petitioners/Cross-Respondents,

vs.

WALTER LEE, Superintendent of Port Authority Police,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF THE AIRPORTS ASSOCIATION COUNCIL INTERNATIONAL-NORTH AMERICA (AACI-NA) IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Airports Association Council International-North America ("AACI-NA") is a cooperative, non-profit association of approximately 150 state, local and regional governmental bodies that own and operate more than 200 airports throughout North America. AACI-NA member airports serve more than 90% of the United States domestic scheduled air passenger and cargo traffic, and virtually all United States scheduled international traffic. More than 850 million annual passenger enplanements and deplanements occurred at our U.S. airports in recent years.

AACI-NA submits this *amicus* brief to urge that our nation's public airports be allowed to preserve their fundamental air transportation purpose by regulating First Amendment activity on their premises so as to prohibit fund solicitations and leafleting. The three commercial air carrier airports operated by the Port Authority are not public fora, and they and other airports around the country have consistently resisted efforts to turn them into public fora. Historically airports have not served as venues for expression of ideas, nor would such usage be consistent with their fundamental purpose, which is to facilitate safe and efficient air travel.

If this Court should hold that the Respondent's airports are public fora, all AACI-NA United States member

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[1] This *amicus curiae* brief is filed pursuant to the consent of each of the parties to this matter, which written consents have been obtained and filed with the Clerk of this Court pursuant to United States Supreme Court Rule 37.3.

airports would be required to be made available for solicitation, leafleting and other expressive activity for which airports are not intended and which would interfere with the safe and efficient operation of the nation's airports.

SUMMARY OF ARGUMENT

Governmental regulations of First Amendment activity in both traditional public fora and designated public fora must be reasonable with respect to time, place and manner in order to be constitutional. However, in a non-public forum, a government's power to regulate First Amendment activity is much broader. Expressive activity may be reasonably regulated and even prohibited in the interest of preserving the non-public forum for the purposes for which it was intended.

This Court has consistently held that government property that has not traditionally served as a place for expressive activity may be preserved for the purposes for which it is intended and need not be treated as a public forum. *United States v. Kokinda*, ___ U.S. ___, 110 S. Ct. 3115 (1990); *Cornelius v. NAACP Legal Defense And Educational Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

Airports have a single purpose – facilitating safe, efficient and convenient air travel. Airport operations, including security measures and the need to manage heavy pedestrian traffic flows and congestion, reflect this purpose. Airport facilities financing, which relies on air transportation user fees and not general tax revenues,

similarly reflects the air transportation purpose of airports.

Because of their sole purpose of facilitating air transportation, airports have critical differences from traditional public fora. Airports, unlike traditional public fora, are not integrated into their neighboring communities. Airport patrons, unlike users of traditional public fora, are a captive audience to expressive activity being conducted in the areas which they must use in order to travel.

Because airports do not have a long tradition of being used as sites for assembly and debate, and were not created to serve as sites for expressive activity, airports are not public fora. Indeed, commonplace airport security restrictions, which would be constitutionally forbidden on a public street or town square, are compelling evidence that, to the government and its citizenry alike, airport premises are unlike public fora. Governmental airport proprietors should therefore be permitted to prohibit leafleting and soliciting at airports in the interest of preserving their air transportation purposes.

ARGUMENT

I. GOVERNMENT PROPERTY CONSTITUTES A TRADITIONAL PUBLIC FORUM ONLY IF IT HAS A HISTORY OR A PRIMARY PURPOSE OF SERVING AS A PLACE FOR EXPRESSING IDEAS

In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), this Court established a legal framework for determining whether, and to what

degree, the First Amendment requires the government to permit expressive activity in a publicly owned facility. For purposes of evaluating government regulation of expressive activity in publicly owned facilities, *Perry* differentiates between a traditional public forum, a designated public forum, and a non-public forum which is created for purposes other than expressive activity by the general public. *Perry* 460 U.S. at 45-46. Petitioners/Cross-Respondents ("Petitioners") erroneously claim that the Port Authority's three airports are public fora. They do not argue that the airports are designated public fora.

Under the *Perry* framework the government may constitutionally prohibit expressive activity in a content-neutral manner within a traditional public forum or a designated public forum only if the prohibition is reasonable as to time, place and manner. *Perry*, 460 U.S. at 45-46; *Cornelius*, 473 U.S. at 800.[2]

In a non-public forum, however, the government may constitutionally enact reasonable regulations that preserve the forum for its "intended purposes," as long as there is no viewpoint discrimination. *Perry*, 460 U.S. at 46. As the Court most recently stated in its plurality opinion in *Kokinda*, "regulation of speech activity where the

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[2] Additionally, government regulations of expressive activity within traditional public fora and designated public fora which are content-based, as opposed to content-neutral, must also be "narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46. There has been no suggestion in the present case that the Port Authority's regulations are content-based.

Government has not dedicated its property to First Amendment activity is examined only for reasonableness." *Kokinda*, 110 S. Ct. at 3119-3120.

As this Court has held, a government-owned facility is a traditional public forum only if it is among "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 45). In addition, "a principal purpose of traditional public fora is the free exchange of ideas." *Cornelius*, 473 U.S. at 800.

Classic examples of traditional public fora include public streets and parks. As the Court stated in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

This Court has never specifically identified as a traditional public forum anything other than a street, sidewalk, or park. *See Cornelius*, 473 U.S. at 806; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792-93 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45.

Airports are easily distinguishable from traditional public fora recognized by the Court – streets, parks and sidewalks – because airports do not have a tradition of use or a primary purpose as a place for public debate and

expression of ideas. In fact, this Court has never held that an airport is a public forum. *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Justice White, in his concurring opinion, joined in by the Chief Justice, specifically stated that the Court's opinion "should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum." *Board of Airport Commissioners*, 482 U.S. at 577 (White, J., concurring).

II. AN AIRPORT'S PURPOSE IS TO PROVIDE FOR THE SAFE AND EFFICIENT FLOW OF PASSENGERS IN AIR TRANSPORTATION

Airports facilitate air travel, not the expression of ideas. J.A. 453. As Congress stated in the Declaration of Policy of the Airport and Airway Improvement Act of 1982, "[T]he continuation of airport and airway improvement programs and more effective management of the Nation's airport and airway system are required to meet the current and projected growth of aviation and the requirements of interstate commerce, the Postal Service, and the national defense." 49 U.S.C. App. § 2201(a)(2).

All airport functions and services either directly or indirectly relate to air travel. See R. Horonjeff & F.X. McKelvey, *Planning & Design of Airports*, at 325-27 (3d ed. 1983) [Lodg 3-5].[3] The special security and congestion

[3] "Lodg" followed by numerals refers to pages in the Lodging of *Amicus Curiae*. The Lodging, which has been deposited with the Court, contains copies of material other than statutes, regulations and judicial opinions referred to herein.

problems of airports reflect their primary function of providing for the safe and efficient flow of passengers in air transportation. J.A. 456, 459. Airport financing also reflects the air transportation purpose of airports by placing the cost of operating airports on the users of airports, not on the general public. J.A. 454.

A. Unique Security Concerns And Security Measures Reflect Airports' Purpose Of Facilitating Safe Air Transportation And Distinguish Airports From Traditional Public Fora

Security concerns and security measures at airports underscore airports' sole purpose of facilitating the safe and efficient transportation of air travelers and goods, and not the expression of ideas. The federal government requires screening of airport patrons and their luggage, so as to facilitate safe air travel.

The notorious history of skyjacking and other forms of terrorism at airports has resulted in the adoption of pervasive security precautions. J.A. 454. Federal law mandates these security precautions, which are taken at few other public locations.[4] Federal regulations require the

[4] Other locations marked by attendant security precautions have also been judicially and administratively recognized as not available for the general exercise of free speech rights: an Air Force base, *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990) *aff'd on rehearing en banc*, 944 F.2d 732 (1991); Internal Revenue Service offices, *United States v. Burton*, 888 F.2d 682 (10th Cir. 1989); and a federal post office and courthouse building, *United States v. Bader*, 698 F.2d 553 (1st Cir. 1983). *See*

(Continued on following page)

screening of all airport patrons and the items they are carrying when they enter "sterile" security areas – regardless of whether probable cause exists to believe that any such individual is carrying a weapon. 14 C.F.R. 107.1, 107.3, 108.5, 108.7, 108.9.

While these screening or security checkpoints are typically set up as airport patrons enter concourses leading to aircraft gates, some airports set up the sterile areas immediately after the airline ticket counters; in such facilities, aside from ticket areas, unscreened individuals may not enter the terminal. The sterile area could even be established – at the airport's option, subject only to the approval of the FAA Director of Civil Aviation Security – at the entrance to the airport terminal, thus requiring the screening of anyone seeking access to the terminal.

Airports could, if they chose, restrict access to their facilities so that only ticketed passengers or employees could obtain entry to the terminal, or even to the airport itself. In fact, in 1990-91 during Operation Desert Storm, the Federal Aviation Administration, exercising its emergency powers under 14 C.F.R. 107.11(f), *required* airports to limit access to the sterile areas to such ticketed passengers or employees. These stringent requirements were in effect for more than four months, extending even after the military operation was over. In airports where the

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also 41 C.F.R. 101-20.308 and 101-20.309 which prohibit soliciting alms and distributing flyers in property under the charge and control of the General Services Administration, as well as 39 C.F.R. 232.1(h)(1), prohibiting soliciting alms and contributions on Postal Service premises.

sterile area began immediately after the ticket counters, this federally mandated restriction effectively banned everyone but ticket holders and employees from virtually the entire airport terminal. Moreover, even in the absence of a military emergency, the general public is subjected to searches and other security restrictions, *see* 14 C.F.R. 107.1, 107.3, 108.5, 108.7 and 108.9, which would never pass constitutional muster if carried out in a park or on a city street.[5]

Such wholesale screening, without probable cause, would not be permitted in a traditional public forum, such as a village square or a city street. *See. e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (pedestrian on public street may not be searched for weapons unless officer reasonably believes that he or others are at risk of harm). That the federal government *requires* screening at airports underscores the fact that airports differ from such public fora; the government action recognizes that the function of

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[5] The fact that airports do not routinely choose to restrict access to their facilities to passengers and employees does not dilute the significance of the fact that they *could* do so. *See Kokinda*, 110 S. Ct. at 3121: "In *Greer* we held that the power of the Fort's commanding officer summarily to exclude civilians from the area of his command demonstrated that 'the notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false.' " (quoting *Greer v. Spock*, 424 U.S. 828, 838 (1976)).

airports is to provide for the safe and efficient flow of passengers in air transportation, not to provide a forum for the expression of ideas.

B. Special Problems Of Congestion Reflect Airports' Purpose Of Facilitating Efficient Air Transportation And Distinguish Airports From Traditional Public Fora

Congestion at major airports is bad and getting worse. J.A. 456. According to the Congressional Budget Office,

> Crowding has thus emerged as the major airports' number-one problem, and the FAA anticipates a worsening of airport congestion in coming years.

Congressional Budget Office, Financing U.S. Airports in the 1980's, at xix (1984) [Lodg 21]. A senior research advisor of the Transportation Research Board ("TRB") has observed that "[s]ome airports are exceeding capacity almost on a daily basis." Lemer, *Airport Landside Capacity: A Growing Concern*, TR News, May-June 1986, at 2 [Lodg 14].

One factor which has contributed to congestion in airport terminals is the use of larger aircraft to conduct aircraft operations. "Between 1972 and 1988, there was a 78% increase in the average number of passengers per aircraft operation nationwide, and a 60% increase at large hub airports." U.S. Department of Transportation, National Plan of Integrated Airport Systems 1990-1999 (1991), at p. 14 [Lodg 33]. As a result, even airports which

have not experienced an increase in the number of flights have suffered increased congestion in the terminals.

The unique pedestrian congestion problems are symptomatic of airports' singular purpose of facilitating the transportation of air travelers and goods. At an airport, unlike in a street or a park, a pedestrian delay of minutes or even seconds can cause a loss of hours in travel time because of a missed plane. J.A. 455. The design and operation of individual airports is intended to facilitate the efficient flow of hundreds of millions of people to and from tightly scheduled airline flights within a national air transportation network, not to provide places for people to congregate and express ideas. J.A. 455.

C. Airports Are Run By Governmental Entities In Their Role As Proprietors, Not Regulators, As Evidenced By The Nature Of Their Business And Their Financing.

1. Airport Financing Emphasizes The Air Transportation Purpose Of Airports

In accordance with the public policy of making users pay for transportation facilities, airports are generally financed by user fees, not by general tax funds. The source of revenue for most capital projects at airports, including their terminals, streets and sidewalks, is revenue bond financing, backed up by the airport users, who pay rentals, fees and other charges. On the other hand, general revenue bonds backed up by general tax funds finance streets and parks. Similarly, user fees, not general

revenues, pay for the operation and maintenance of airport facilities, again, in contrast to streets and parks. J.A. 454. These characteristics further distinguish airports from streets and parks and illustrate that airports are special purpose facilities which do not function as places for expressive activity. In this vein, Congress recently authorized airport operators to impose, at their option, a local "passenger facility charge, of up to $3 per enplaned passenger, to be used for capital projects to improve capacity, safety, security and noise mitigation." Aviation Safety and Capacity Expansion Act of 1990, § 9110, 49 U.S.C. App. 1513(e).

In a 1985 report to Congress, the Secretary of Transportation said that virtually all airport funding comes from airport-user sources. Department of Transportation, National Plan of Integrated Airport Systems 1984-1993, at 16 (1985) [Lodg 11]. The Port Authority's airports are typical of most major airports in the United States in that they are, in fact, financially self-supporting. At such airports, operating costs must be satisfied with revenues generated from travel related user fees. 49 U.S.C. App. § 2210(a)(9) (1988) and Supp. II (1990).

Even that portion of airport capital funding provided by the federal government does not come from general revenues, but is derived from excise taxes on airline tickets, air waybills, aircraft tires and aircraft fuel. 26 U.S.C. §§ 4041, 4261-62, 4271-72, 9502(b) (1988); 49 U.S.C. App. § 2210(a)(9) (1988) and Supp. II (1990).

The Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Title V, 96 Stat. 671, as amended, requires airports which accept federal aid (which

includes all major air carrier airports) to "maintain a fee and rental structure for the facilities and services being provided to the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection. . . . " 49 U.S.C. App. § 2210(a)(9) and Supp. II (1990).

Thus, airports are under the same type of Congressional directive as the U.S. Postal Service, as noted by this Court in Kokinda. "Congress has directed the Service to become a self-sustaining service industry. . . . " *Kokinda*, 110 S. Ct. at 3122.

2. Local Governmental Entities Operate Airports Strictly To Facilitate Efficient Air Transportation

"The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or, as was said in *Lehman*, 'arbitrary, capricious, or invidious.' " *Kokinda*, 110 S. Ct. at 3119 (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303).

While acting as an airport proprietor, local governments are constrained by the Congressional directive that the purpose of airports is to provide for the safe and efficient flow of travelers and goods in air commerce. *See, e.g.*, The Airport and Airway Improvement Act of 1982, Sections 505(a), "[i]n order to maintain *a safe and efficient nationwide system of public-use airports* to meet the present

and future needs of civil aeronautics, the Secretary is authorized to make grants from the Trust Fund for airport development and airport planning . . . " and 504(a)(1), requiring the Secretary of Transportation to publish a plan which "shall include the type and estimated cost of eligible airport development considered by the Secretary to be *necessary to provide a safe, efficient, and integrated system of public-use airports* to anticipate and meet the needs of civil aeronautics, to meet requirements in support of the national defense as determined by the Secretary of Defense, and to meet identified needs of the Postal Service." 49 U.S.C. App. §§ 2204(a) and 2203(a) (emphasis added).

This purpose is germane to the issue before the Court. "Consideration of a forum's special attributes is relevant to the constitutionality of a regulation, since the significance of the governmental interest must be assessed in light of the characteristics, nature, and function of the particular forum involved." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981). In *Kokinda*, the purpose of the forum was "to accomplish the most efficient and effective postal delivery system." *Kokinda*, 110 S. Ct. at 3122. In the instant case, the purpose of the forum is to accomplish the safe, efficient and effective movement of travelers and goods in air commerce.

Consistent with this purpose, airports typically seek only to provide facilities and amenities for shippers, travelers, and those who assist them. The finding by the Second Circuit and the undisputed facts in the record of this case – that virtually everyone at the airports in

question was there on airport-related business – is typical of the experience of our members across the country. Thus, much as this Court found in *Kokinda* that "the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business," *Kokinda*, 110 S. Ct. at 3120, airport facilities are constructed solely for the passage of individuals engaged in airport business. And just as the District Court found in *Kokinda* that "Postal patrons must use the sidewalk to enter the post-office," air travelers and those who accompany them must use airport roadways, sidewalks, and terminals to get to their planes.

3. The Fact That Airports Are Theoretically Open To the Public Or Available For Other Forms Of Expressive Activity Does Not Make Them A Public Forum

Even though portions of airport facilities are open to the public, this fact does not make such facilities public fora. "Publicly owned or operated property does not become a 'public' forum simply because members of the public are free to come and go at will." *United States v. Grace*, 461 U.S. 171, 176 (citing *Greer v. Spock*, 424 U.S. 828, 836 (1976)). Although the question of whether the property has been "generally open to the public is a factor to consider in determining whether the government has opened its property to the use of the people for communicative purposes, *it is not determinative of the question*. . . . There is little doubt that in some circumstances the government may ban the entry on to public property that is not a 'public forum' of all persons except those who have legitimate business on the premises. The government, 'no

less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.' " *Grace*, 461 U.S. at 177-178 (quoting *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966)).

Airports are just such facilities which could be closed off to all except those who have legitimate business – and as a practical matter, they are. Airports are rarely frequented by people without legitimate business on the premises, whether it is to catch a plane, help a friend or relative who is catching a plane, deplane or meet someone who is deplaning. J.A. 458. In this regard, airports are more like the Supreme Court plaza, steps and building itself – where expensive activities are prohibited – than the public sidewalks on the perimeter of the Court grounds which, as this Court found in *Grace*, are indistinguishable from any other sidewalk in the District of Columbia. *Pearson v. U.S.*, 581 A.2d 347 (D.C. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 51 (1991).

The fact that *some* airports invite the general public in for some special occasions (*e.g.*, an airport "open house"), does not make an airport a public forum any more than admission of the public to the Supreme Court building makes it a public forum or the annual airshow at an air force base, which may attract hundreds of thousands of spectators, makes the base a public forum. Rather, proper analysis of the factors outlined by the court in *Perry* must still be done.

Petitioners argue that the fact that some First Amendment expressive activity, such as campaign press conferences by presidential candidates, has been conducted on

airport premises requires a finding that airports have opened themselves up as public fora. See Petitioner's brief at 35. This Court has rejected that notion as well. "Whether or not the [Postal] Service permits other forms of speech, which may or not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic." *Kokinda*, 110 S. Ct. at 3123 (citing *Heffron*, 452 U.S. at 653).

4. Solicitation Is Inherently Disruptive Of The Business Of Operating An Airport

In *Kokinda*, this Court agreed with the Government's assertion that "it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the postal service business." *Kokinda*, 110 S. Ct. at 3123. If it is disruptive of the business of providing postal services – where people seek to mail letters and parcels, buy stamps, and pick up mail – it is even more disruptive of the business of providing air travel services, where delays of a few minutes or even seconds can mean the difference between catching a plane and missing it. This Court has recognized the problems inherent in solicitation – that the person confronted "must listen, comprehend, decide and act in order to respond to a solicitation," that "[s]olicitors can achieve their goal only by 'stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature,' " *Kokinda*, 110 S. Ct. at 3123 (quoting *Heffron*, 452 U.S. at 653), and that "sales and the collection of solicited funds

not only require the fairgoer to stop, but also 'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.' " *Kokinda*, 110 S. Ct. at 3124 (quoting *Heffron*, 452 U.S. at 665 (Blackman, J., concurring in part and dissenting in part)). Such problems are compounded at airports, where the people being solicited often have luggage which must be put down as they get out their wallets or open their purses to remove their money. Such luggage creates a further obstruction to the orderly flow of traffic in an airport.

This Court found that the above-quoted description of the disruption and delay caused by solicitation "rings of 'commonsense,' which is sufficient in this Court to uphold a regulation under reasonableness review." *Kokinda*, 110 S. Ct. at 3124. Another factor recognized by this Court as a significant disruption of the Postal Service's attempts to operate its facilities efficiently was that "[b]ecause of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals." *Kokinda*, 110 S. Ct. at 3124. Such demands place no less of a burden on airport directors. For a variety of reasons, the decisions on such issues wind up in the laps of the top officials at airports, who have other pressing demands on their time relating directly to operating the airport.

The Court in *Kokinda* was also impressed by the experience that the Postal Service had in attempting to

regulate expressive activity. Airports have attempted to ban expressive activity or, if ordered by the courts to permit leafleting and soliciting, to restrict such activities since they first manifested themselves at airports in the early 1970s.

The list of cases Petitioners have appended to their brief speaks volumes of the vigor with which airports have uniformly tried to ban or restrict those activities at their facilities. Rather than open themselves up to expressive First Amendment activities, airports have fought such activities in court because soliciting and leafleting are so disruptive of airports' purpose. As in *Kokinda*, it is reasonable in the instant case to determine that such expressive activities create significant interference with the mandate to operate the facilities in question as effectively and efficiently as possible. *Kokinda*, 110 S. Ct. at 3124.

Finally, Petitioners make much of the fact that few complaints about their activities have been received at the airports in question or at other airports. See Petitioner's brief at 11-12. It "rings of commonsense" that the people who are most disturbed by a delay of minutes or seconds as they rush through airports to catch their flights are not inclined to take the time to inquire as to how to file a complaint about being harassed or delayed, nor to take the additional time required to actually follow up. The fact that any complaints at all are filed under these circumstances is rather remarkable.

D. Physical Separation Of Airports From The Community Distinguishes Airports From Traditional Public Fora

Unlike streets and parks, airports do not provide sites for assembly and debate. Instead, airports process departing and arriving passengers to and from aircraft. Unlike streets and parks which are integrated into the day-to-day life of surrounding communities, airports are physically separated from neighboring communities. The people living near an airport do not enter it as they travel in their neighborhood. Even airport visitors frequently do not enter the terminal buildings when they drop off or pick up an air passenger.

This feature of airports – separation from the community they serve – further distinguishes airports from traditional public fora. For example, in determining whether two military bases could prohibit leafleting, the Court focused on the integration of the bases into the surrounding community. *Flower v. United States*, 407 U.S. 197 (1972), and *Greer v. Spock*, 424 U.S. 828 (1976). In *Flower* this Court held that a military commander could not bar leafleting on a street in Fort Sam Houston, Texas, where the streets of the military base were wholly integrated into and a part of the surrounding city of San Antonio. In *Greer*, on the other hand, the Court upheld Fort Dix's regulations forbidding leafleting in part because Fort Dix was not integrated into any surrounding community, and thereby retained its character as a separate military enclave. *Greer v. Spock*, 424 U.S. at 835-36.

Like the military base in *Greer*, and unlike the public sidewalks in *Grace*, airports are not physically integrated

into the day-to-day life of surrounding communities. When people enter airport grounds, they know it. This contrasts sharply with the situation in *Grace*, where this Court found that "[t]he sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C. . . . there is no separation, no fence, and no indication whatever to persons stepping from the street and the sidewalks that serve as the perimeter of the Court that they have entered some special sort of enclave." *Grace*, 461 U.S. at 180. This fact underscores the single purpose of an airport, air transportation, and further distinguishes airports from traditional public fora like streets and parks.

In fact, airports are immediately distinguishable as a "special type of enclave." For one thing, virtually no one enters an airport on foot. Because airports are typically separated from city centers, people either arrive via mass transit or by motor vehicle. Either way, airports are marked. There are directional signs indicating access routes to the airport, usually beginning several miles away from the airport boundary. As one enters the airport grounds, typically there are prominent signs with the name of the airport, as well as the now-familiar directional signs for Arrivals, Departures, and Rental Car Returns. As one gets closer to the terminal, there are signs for individual airlines.

Curbsides by terminal buildings are distinctive – with skycaps and their curbside check-in stations, cars and vans loading and unloading passengers with their luggage, and the plethora of hotel and rental car courtesy vans, along with long lines of taxi cabs. Indeed, airports

are so distinctive that it would be implausible for someone not to deduce that they had entered an enclave wholly distinct from the rest of the community, as opposed to an area that was fully integrated into the community.

In this regard, even more so than the sidewalks in *Kokinda* or the streets and sidewalks on the military base in *Greer*, it should be clear that even though there are roadways, curbs and sidewalks at an airport, they are not public fora. Rather, they are often heavily congested areas designed for one purpose only – to facilitate the ingress and egress of passengers and baggage and those who accompany or assist them to and from the terminals. As in *Kokinda* they are the only entryway for persons seeking to do business at the facility in question. Thus, it is reasonable for the airport proprietor to keep them less congested by banning expressive activity such as soliciting and leafleting. Although airport roadways and sidewalks are not at issue in the instant case, it is *amicus curiae's* belief that, using the standards followed by the court in *Greer*, *Grace*, and *Kokinda*, such roadways and sidewalks are not public fora.

E. The Presence Of Captive Audiences In Airports Distinguishes Airports From Traditional Public Fora

Unlike the traditional public fora of streets and parks, airports contain captive audiences. J.A. 458. Airport terminals provide the only paths that the public may use in getting to and from airplanes. Because of space limitations airports cannot provide alternate routes for

people who do not wish to be subjected to uninvited persuasion.

As noted by Justice Douglas with regard to the patrons of public transportation vehicles, the rights of such captive audiences "to be free from forced intrusions on their privacy" would be violated if they were forced to be the object of uninvited attempts at persuasion. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *cf. Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 542 (1980). Inability of airport users to avoid uninvited persuasion therefore further distinguishes airports from traditional public fora like streets and parks.

III. BECAUSE AIRPORTS ARE NOT TRADITIONAL PUBLIC FORA, FIRST AMENDMENT ACTIVITY MAY BE REASONABLY REGULATED TO PRESERVE THE AIR TRANSPORTATION PURPOSE OF AIRPORTS

As demonstrated above, airports have not traditionally been sites for nor do they have as a principal purpose the expression of ideas. Airports therefore do not constitute public fora. That airports are not public fora is wholly consistent with the holdings of this Court that government ownership of property does not automatically open up that property to the public for First Amendment expressive purposes. *United States v. Kokinda*, 110 S. Ct. 3115 (1990). As the Court stated in *Greer v. Spock*, 424 U.S. 828 (1976):

> [No principle exists] that whenever members of the public are permitted freely to visit a place

> owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.

Greer, 424 U.S. at 836. Moreover, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer*, 424 U.S. at 836 (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

Holding airports to be public fora, on the other hand, will unreasonably interfere with governments' ability to operate airports and all other government property for the purposes for which they are intended, causing airports and perhaps all other government property to "immediately . . . become Hyde Parks open to every would-be pamphleteer and politician." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1973); *see also Perry*, 460 U.S. at 49 n. 9.

Petitioners would have the Court overturn the Port Authority's regulation banning soliciting and leafleting because, they assert, time, place and manner restrictions can serve to protect the Port Authority's interests in operating its airport facilities. Petitioners confuse the possibility that time, place and manner restrictions *might* work at airports with the view that airports *must* be constrained from adopting any restrictions besides times, place and manner restrictions. This begs the question of forum analysis, which, this Court has held, must first be done to determine the appropriate level of scrutiny to apply to the airport's regulation. If the airport is not a public forum, then any reasonable regulation is allowed, even if other less restrictive regulations might also be workable. This Court has found that "the Government's

decision to restrict access to nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum is not mandated." *Cornelius v. NAACP Defense & Educational Fund, Inc.*, 472 U.S. 788, 808 (1985).

"Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a non-public forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809. Thus, following, the recent decisions of this Court, the fact that the Petitioners find airports to be attractive places to solicit funds and distribute literature, and the possibility that lesser restrictions than a total ban on soliciting and leafleting on the airport might alleviate some of the airport's concerns, are not relevant factors if the Court determines, consistent with the analysis set forth in *Perry*, *Grace*, and *Kokinda*, that airports are not public fora. As operators of non-public fora, the airports would be given latitude to exercise their proprietary rights, as long as they are reasonable.

Airports should therefore be permitted to enact and enforce reasonable content neutral regulations, such as those adopted by the Port Authority, in order to safeguard airport premises for the air transportation purpose to which they are dedicated.

CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Second Circuit should be (i) reversed to the extent that it invalidates the Port Authority's regulation of distribution of literature; and (ii) affirmed to the extent that it upholds the Port Authority's regulation of in-person solicitation of money.

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